No. 17-1174

In The
Supreme Court of the United States

LUIS A. NIEVES and BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN SUPPORT

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QUESTION PRESENTED

When a plaintiff claims under 42 U.S.C. § 1983 that police officers retaliated against his First Amendment-protected expression by arresting him, does the existence of probable cause for the arrest operate as an absolute bar to his claim?

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INTRODUCTION

Russell Bartlett agrees with petitioners that the question presented by this case – whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983 – is identical to the question that this Court will resolve in *Lozman v. City of Riviera Beach, Florida*, No. 17-21. He also agrees that the petition for certiorari in this case should be held for disposition in accordance with the Court's decision in the *Lozman* case. But unlike petitioners, Bartlett believes this case illustrates the danger in permitting *post hoc* probable cause to defeat a First Amendment retaliatory-arrest claim, for "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). Granting law enforcement the affirmative defense of *post hoc* probable cause against First Amendment retaliatory-arrest claims will undoubtedly deter the exercise of free speech in this country. *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) ("[A] person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech."). Bartlett presents his statement of the case with these considerations in mind. SUP. CT. R. 15.2.

STATEMENT OF THE CASE

In April 2014 Russell Bartlett attended Arctic Man – a multi-day, outdoor winter sporting event near Summit, Alaska – with his friend David Krack and Krack's teenage cousin, MacCoy Walker. C.A.E.R. 111, 160, 172. Before going to a party with his friends on the evening of April 12, Bartlett had dinner at his campsite and drank a few beers, but at no time was he highly intoxicated. C.A.E.R. 275.

After the three friends arrived at a campsite party, Alaska State Trooper Luis Nieves appeared to investigate underage drinking. C.A.E.R. 23-24. Nieves confronted Bartlett, tapping him on the shoulder and requesting to speak. C.A.E.R. 11, 194. When Bartlett replied "What for," Nieves's demeanor changed, and he told Bartlett in an aggressive tone: "You look like you're pretty interested in what's going on over there," referring to the underage drinking investigation. C.A.E.R. 194. Bartlett declined to speak to Nieves. C.A.E.R. 194; *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business." (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983))). At that point Nieves contemplated arresting Bartlett for disorderly conduct but chose instead to not arrest him at that time. C.A.E.R. 227.

Some minutes later Bartlett observed another trooper, Bryce Weight, interrogating young Walker as Krack stood nearby. C.A.E.R. 165, 198-200. Bartlett,

believing Weight had no right to question Walker without a parent or guardian present, walked over to Weight and voiced this opinion. C.A.E.R. 11, 198-200. Although Bartlett expressed his opinion loudly, he did so to be heard over the party's blaring music, which forced everyone to stand close together and speak loudly if they wished to communicate effectively during the party. C.A.E.R. 117, 185, 249, 252.

What happens next was captured by reporter and cameraman John Thain, who had been filming Nieves all night to cover Arctic Man for a local television station. C.A.E.R. 27, 245-46. Enclosed within this opposition is a DVD containing two videos of the incident: one that has been slowed down in high resolution, C.A.E.R. 331-33; DVD Track 1, and one in normal time that is three minutes long and shows the incident between timeframes 2:02 and 2:37. C.A.E.R. 6-7; DVD Track 2.

The longer video captures Nieves approaching Weight and Bartlett; Walker, whose back is turned to the camera, stands in between Weight and Bartlett facing Krack, whose feet are visible. DVD Track 2, at 2:04. The edited video clearly shows Weight looking up and observing the arrival of Nieves and the video camera; Weight then turns to Bartlett, steps forward, and pushes him forcefully on the chest without warning.

Although Walker obscures Bartlett's right hand, Weight's right hand lands on Bartlett's chest before Bartlett's right arm flies back in reaction to the impending shove. C.A.E.R. 273-75; DVD Track 1, at 0:04-0:09. Nieves grasps Bartlett's left hand – seconds later,

Weight grabs Bartlett's right hand. Nieves repeatedly yells at Bartlett to "Back up," demanding that he get "on the ground." DVD Track 2, at 2:05-2:15. Weight then kicks at Bartlett's right leg, causing him to go to his knees. Bartlett shouts "Alright" in reaction to the demands while freeing his hands to avoid getting his face shoved into the snow. DVD Track 2, at 2:17. Bartlett hesitates slightly to lie prostrate because of an old back injury he wished not to re-aggravate. C.A.E.R. 273-75

Nieves then twice threatens Bartlett with a taser, and Bartlett immediately puts his hands behind his back. Throughout the attack, a crowd encircles Bartlett, illuminated by lights from Thain's video camera. Before the video of the attack ends, Walker and Krack can be seen observing Bartlett lying prostrate in the snow. The troopers' sudden and violent assault of Bartlett, who had only expressed his opinion, quickened young Walker's pulse and caused him to shake. C.A.E.R. 187.

In the next scene Nieves tells Bartlett, "Now you're going to jail," to which Bartlett responds, "For what?" DVD Track 2, at 2:24-2:34. Although the edited video does not capture it, between that conversation and when Nieves shuts the police car door on Bartlett, Nieves tells Bartlett, "[B]et you wish you would have talked to me now" in reference to their earlier encounter at the campsite party. C.A.E.R. 206; App. 6, 36-37.

The State of Alaska charged Bartlett with disorderly conduct and resisting arrest, App. 12-13, C.A.E.R. 10-11, and not with "harassment" as petitioners assert. Pet. for Cert., at 2. The State dismissed these charges against Bartlett nearly a year after they were filed, C.A.E.R. 16-20, allegedly due to budgetary reasons. Pet. for Cert., at 4. Bartlett then sued Weight and Nieves alleging, *inter alia*, retaliatory arrest under 42 U.S.C. § 1983. App. 15. To establish retaliatory animus in opposition to the Troopers' summary judgment motion, Bartlett highlighted contradictions and inconsistencies between the Troopers' incident reports and the video of his arrest. C.A.E.R. 111-58.

Weight wrote in his incident report that Bartlett "stepped forward to where his chest was almost touching mine, and his face very close to mine," yet the video depicts the men standing at arm's length. C.A.E.R. 10. Weight wrote that after shoving Bartlett, Bartlett "came at me again," C.A.E.R. 10, yet the video does not show this. Weight later testified that his report was inaccurate as it reflected only his "belief" that Bartlett *would have* come at him again had Nieves not grabbed Bartlett's arm. C.A.E.R. 262-64. Weight wrote that Bartlett "continued to get in between me and the juvenile," C.A.E.R. 10, yet the video shows all three individuals standing equidistant from one another. Weight wrote that Bartlett "attempted to 'head-butt' Sgt. Nieves," C.A.E.R. 11, yet the video shows no such attempt.

Nieves wrote in his incident report that when he first encountered Bartlett at the campsite party, "Bartlett began to shout to . . . the occupants of the RV that they did not have to speak with me or allow me in the RV." C.A.E.R. 11. But three witnesses, including the RV's owner, corroborated Bartlett's assertion that he never told the RV's occupants not to speak with Nieves. C.A.E.R. 196-97, 234-39, 243-44. Nieves wrote that Bartlett "began to close [sic] Trooper Weight," C.A.E.R. 11, but the video instead shows Weight stepping toward Bartlett to shove him. Nieves wrote that he advised Bartlett twice that he was under arrest, C.A.E.R. 11, but the video establishes that he did not. Nieves wrote that Bartlett "swung his right fist toward me," C.A.E.R. 11, but again, the video does not corroborate this assertion.

Weight and Nieves later submitted sworn declarations to the district court that were tellingly silent on whether Bartlett "swung his right fist" or attempted to "head-butt" during the altercation. C.A.E.R. 68-70, 89-90. Nevertheless, the district court granted summary judgment to Weight and Nieves on Bartlett's retaliatory arrest claim. It found that probable cause existed to arrest Bartlett for the uncharged crime of harassment, App. 19-23; C.A.E.R. 14, 16, so his retaliatory arrest claim necessarily failed because this Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." App. 36 (quoting *Reichle v. Howards*, 566 U.S. 658, 664-65 (2012)).

Bartlett won his appeal to the Court of Appeals for the Ninth Circuit, allowing him a trial on his First-Amendment retaliatory arrest claim, because "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." App. 5 (quoting *Ford*, 706 F.3d at 1195-96). According to the Ninth Circuit:

> Most importantly, Bartlett alleged that Sergeant Nieves said "bet you wish you would have talked to me now" after his arrest. This statement, if true, could enable a reasonable jury to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves's questions earlier in the evening. App. 6.

Bartlett's chance to hold the Troopers accountable for their retaliation against him for simply speaking his mind now hinges on this Court's decision in the *Lozman* case.

REASONS FOR GRANTING THE PETITION

Bartlett agrees with petitioners that "[b]ecause [their] petition seeks review of the same question presented in *Lozman*, the Court should grant the petition and hold it for disposition in accordance with the Court's decision in the *Lozman* case." Pet. Cert. 7. Luckily, Bartlett suffered no lasting injuries from the Troopers' attack on him, but he spent time and money

defending himself against their baseless criminal charges that were ultimately dismissed. C.A.E.R. 112, 20. This should not be the price a contrarian, protestor, or other concerned citizen pays for speaking her mind to law enforcement.

The Troopers now admit that "[b]ecause [Bartlett's] conduct did not amount to a major crime, [they] could have used their discretion not to arrest [him,]" and perhaps would have declined to arrest him had they known Bartlett would doggedly pursue a retaliatory-arrest claim against them. Brief for State of Alaska as Amicus Curiae in Support of Respondent, *Lozman v. City of Riviera Beach, Florida*, No. 17-21, at 16. The State's assertion crystalizes the issue: Without a rule of law permitting First-Amendment retaliatory arrest claims to be brought despite *post hoc* probable cause, law enforcement will have carte blanche to "exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity," *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990), just as the Troopers did here. Current law in the Ninth Circuit must remain in force to deter Troopers like Weight and Nieves from making future unconstitutional retaliatory arrests. *See Ford*, 706 F.3d at 1195-96.

CONCLUSION

The petition filed in this case should be held pending this Court's decision in *Lozman v. City of Riviera*

Beach, Florida, No. 17-21, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted,

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